No. 93-643

FILED
OCT 25 1993
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

BESSEMER & LAKE ERIE RAILROAD COMPANY,
Petitioner,

v.

REPUBLIC STEEL CORPORATION, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that this Court's decision in *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156 (1922), reaffirmed in *Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409 (1986), is wholly inapplicable in the following two situations:

   where tariff rates are the primary but not the exclusive means of precluding market entry by competitors, and

   where competitors of the defendant, rather than shippers, are the antitrust plaintiffs.

2. Whether an antitrust plaintiff may recover treble damages under § 4 of the Clayton Act, even though it is an indirect purchaser under *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), and *Kansas* v. *Utilicorp United, Inc.*, 497 U.S. 199 (1990), if it asserts antitrust standing under the balancing approach set forth in *Associated General Contractors, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519 (1983).

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption of the case, other respondents are Jones & Laughlin Steel Incorporated, Wheeling-Pittsburgh Steel Corporation, National Steel Corporation, Sharon Steel Corporation, Erie-Western Pennsylvania Port Authority and Codan Corporation, C.D. Ambrosia Trucking Company, Tauro Brothers Trucking Company, Toledo World Terminal, Inc. and Wills Trucking, Inc.

DISCLOSURE STATEMENT PURSUANT TO RULE 29.1

Petitioner is a wholly-owned subsidiary of Transtar, Inc., a non-publicly owned corporation. USX Corporation, a publicly owned corporation, has a minority stock ownership interest in Transtar, Inc.

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PETITION FOR A WRIT OF CERTIORARI

The Bessemer and Lake Erie Railroad Company ("B&LE") hereby petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-88a) is reported at 998 F.2d 1144. The opinion of the district court denying petitioner's motion for a judgment notwithstanding the verdict (App. 91a-120a) is reported at 759 F. Supp. 219.

JURISDICTION

The court of appeals rendered its judgment on May 27, 1993. A petition for rehearing was denied (App. 121a-131a) on July 27, 1993. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 4 of the Clayton Act, 15 U.S.C. § 15(a), provides in pertinent part that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained. . . ."

STATEMENT

This is an extraordinary antitrust case. The decision below violates two important legal doctrines—*Keogh* and *Illinois Brick*—that define the requirement of "injury" in § 4 of the Clayton Act, which applies to private treble damage actions under the federal antitrust laws. The decision also affirms a judgment that now exceeds $660 million—more than double the largest judgment previously affirmed in a federal antitrust case. This unprecedented award was affirmed only because the courts below refused to enforce both (1) the ban on the use of filed rates in antitrust damage actions established in *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156 (1922), and reaffirmed in *Square D Co.* v. *Niagara Frontier Tariff*

Bureau, 476 U.S. 409 (1986), and (2) the prohibition against recovery of treble damages by "indirect purchasers," established in *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), and reaffirmed in *Kansas* v. *Utilicorp United Inc.*, 497 U.S. 199 (1990). Had the court of appeals enforced these limitations, as the Sixth Circuit did in a case involving precisely the same defendants and the identical alleged conspiracy, *Pinney Dock & Transport Co.* v. *Penn Central Corp.*, 838 F.2d 1445 (6th Cir.), *cert. denied*, 488 U.S. 880 (1988), the damages in this case would have been zero. Because the court below has acted contrary to decisions of this Court and created striking conflicts among courts of appeals concerning the application of both *Keogh* and *Illinois Brick* in the process of affirming a grossly excessive judgment, review by this Court is warranted.

1. **Factual Background.** Petitioner is a small, 200-mile railroad line that operates between Conneaut, Ohio, and North Bessemer, Pennsylvania and that primarily serves USX Corporation (formerly the United States Steel Corporation). Respondents are five steel companies, two dock companies and three trucking companies that shipped or sought to receive or transport iron ore through lower Lake Erie ports. Throughout the relevant period, petitioner and several other railroads [1] transported iron ore for steel companies from railroad and steel company docks on Lake Erie to inland mills. App. 17a.

Much of the iron ore involved in making steel during the relevant period was mined in Michigan, Minnesota and eastern Canada. The ore historically was shipped in a mud-like form. It was loaded onto vessels called "bulkers" and shipped across the Great Lakes to various

[1] The original defendants in addition to petitioner were: the Chesapeake & Ohio Railway Company, The Baltimore & Ohio Railroad Company, CSX Corporation, the Pittsburgh & Lake Erie Railroad Company, Consolidated Rail Corporation, the Norfolk and Western Railway Company, Penn Central Transportation Co., and the Penn Central Corporation. The claims against all of the defendants, except petitioner, were settled or dismissed. App. 13a n.1.

railroad and steel company docks along lower Lake Michigan, Lake Erie and the Detroit River. App. 17a.[2] At these docks, specialized and relatively expensive equipment (essentially a crane equipped with a large bucket) was used to unload the ore from the bulkers. Much of the ore was then reloaded onto trains for delivery to inland steel mills. *Id.* at 17a-18a.

In the mid-1950's, some iron ore producers began processing ore into pellets. This "pelletized" ore could be transported in "self-unloading" vessels that could unload cargo directly onto a dock by means of a conveyer system built into the ships. The use of self-unloading vessels meant that the heavy equipment at railroad docks was no longer necessary to unload iron ore. Accordingly, so-called "private docks," which were owned by entities other than railroads or steel companies, sought to handle iron ore transported by self-unloaders, which the private docks could accommodate. *Id.* at 18a-19a.

Although self-unloading vessels had been used to transport minerals, such as limestone and coal, since the turn of the century, they did not become a significant factor in the transportation of iron ore on the Great Lakes until the early 1970's. Respondents' essential claim is that the railroads conspired to prevent or delay the use of self-unloading vessels for shipping iron ore. *Id.* at 19a.

According to the courts below, the railroads implemented this conspiracy primarily through rates set forth in tariffs filed by the railroads with the Interstate Commerce Commission (ICC). *First,* the railroads "ke[pt] dock handling *rates* for self-unloaders artificially high . . . [by] charg[ing] the steel companies the same dock handling rates for self-unloaders as for bulkers." *Id.* at

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[2] Contrary to the implication in the court of appeals' opinion, railroad docks were hardly dominant in this market. Steel companies owned 21 ore docks on the lower Great Lakes and two-thirds of all ore shipments during the relevant period of time were transported to *steel company docks,* not docks owned by railroads. J.A. 4767-68, 10102-03.

93a (emphasis added). *Second*, "the railroads refus[ed] to publish competitive commodity line haul *rates* [to transport iron ore] from . . . private docks to the steel mills." *Id.* (emphasis added). Instead, pursuant to the tariffs, the railroads would charge higher "class" rates to haul iron ore from "private docks." *Third*, "the railroads either refused to sell or lease to private concerns any property that could be used as an ore dock, or would only sell or lease the property subject to restrictions against such use." *Id.* at 94a. All of the rate-related conduct was subject to active regulation of the reasonableness of the rates by the ICC throughout the relevant period.

2. **Regulatory Background.** For iron ore delivered at the railroad docks, the railroads assessed "dock handling" charges to transfer the ore from the ship to rail cars. These charges were published as rates in tariffs filed with, and regulated by, the ICC.

Rail lines connected both railroad docks and steel company docks to the inland steel mills, and the railroads charged the steel companies "commodity line haul" rates to transport the ore over those lines to the mills. The rates for such transportation were published in tariffs filed with, and regulated by, the ICC. The filed tariffs did not provide "commodity line haul" rates for the carriage of ore from the "private docks" to steel mills. Instead, the filed tariffs provided "class rates" that applied to those shipments and that were much higher than commodity rates, but were equally subject to plenary ICC regulation.[3]

The ICC had regulated both dock handling rates and commodity line haul rates for decades prior to the events at issue in this case. In the *Iron Ore Rate Cases*, 41

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[3] The railroads collectively established these rates through an ICC-approved rate bureau. The Interstate Commerce Act ("ICA") expressly granted railroads antitrust immunity to engage in collective rate-making activities through rate bureaus. 49 U.S.C. § 5b (current version codified at 49 U.S.C. § 10706(a)(2)). *See ICC* v. *American Trucking Ass'ns*, 467 U.S. 354, 359-60 (1984).

I.C.C. 181 (1916); 44 I.C.C. 368 (1917), the ICC granted the *steel companies*' request to maintain uniform rates for handling iron ore on all railroad docks. This protected steel company shippers from disparate rate treatment. Similarly, the ICC also established uniform iron ore commodity line haul rates in order to equalize rail costs among different mills located roughly the same distance from Lake Erie.

Later, the ICC expressly held that railroads were not required to provide lower commodity line haul rates from "private docks" that wanted to compete directly with railroad docks for business. See, *e.g.*, *U.S. Phosphoric Prods. Corp.* v. *Atlantic Coast Line R.R.*, 206 I.C.C. 411 (1935). In 1956, this Court held that railroads were justified under the Interstate Commerce Act in establishing rates on a basis that favored railroad docks over privately owned, non-railroad docks, and in applying full dock handling charges to all shippers, even if shippers provided part of the unloading service themselves. *United States* v. *ICC*, 352 U.S. 158, 173-174 (1956).

In sum, ICC regulation for over 50 years was designed to preserve ore traffic and revenues for railroad docks to sustain their viability as common carriers and—at the steel companies' request—to prevent discrimination among steel company shippers. Although steel companies and any other affected parties could have requested the ICC to modify the rates for handling and carrying ore at any time during the 25 years in question, no such request was ever filed with the Commission. Instead, in the early 1980s, the railroads' filed rates became the core of the respondents' antitrust claims against petitioner and the other railroads.

3. **District Court Proceedings.** In complaints filed between 1980 and 1984, numerous parties brought antitrust actions against the railroads. Most of these actions were transferred to the United States District Court for the

Eastern District of Pennsylvania for pre-trial proceedings. App. 91a.[4]

According to the respondents, the railroads conspired "to halt the progress of self-unloader technology" in order to protect their investments in equipment on their docks. *Id.* at 93a (JNOV opinion). The case was tried largely on proof of two elements, *i.e.*, that the railroads conspired to maintain high class rates for "private docks" and to maintain high rates for dock handling to discourage the use of self-unloading vessels. The case was submitted to a jury instructed that it could impose liability for "various claims relating to the alleged agreement not to establish line haul rates from non-railroad docks." *Id* at 39a. Based on evidence of rate-related activities and instructions that such conduct could form the basis for a finding that petitioner violated the Sherman Act, the jury entered a verdict against petitioner.

With respect to damages, respondent steel companies requested damages for the lost savings that non-parties—vessel and dock companies such as the plaintiffs in the *Pinney Dock* case—allegedly would have passed on to them if self-unloading vessels had been used sooner.

The steel companies were awarded $414 million in "lost lake freight savings" on the following theory: But for concerted railroad rate activity, self-unloading vessels would have come into use sooner to transport iron ore to ports on the Great Lakes; those self-unloading vessels would have been more efficient than the bulkers actually used; and the independent vessel companies would have

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[4] Two related cases asserting identical conspiracy claims against the same railroads were not transferred. *Pinney Dock & Transp. Co.* v. *Penn Cent. Corp.*, and *Litton Indus.* v. *Penn Cent. Corp.*, 838 F.2d 1445 (6th Cir.), *cert. denied*, 488 U.S. 880 (1988). Those cases involved claims by Pinney, which was a private dock company on Lake Erie, and Litton, which operated a fleet of vessels on the Great Lakes that transported ore on the Great Lakes. As discussed *infra*, the Sixth Circuit in that case dismissed under the *Keogh* doctrine all portions of the case involving rates filed with the ICC. 838 F.2d at 1455-60.

passed through their cost savings to the steel companies by charging them less than the steel companies actually paid them for lake transportation. App. 98a. With respect to dock handling charges, the steel companies were awarded $110 million on the hypothesis that the introduction of self-unloading vessels would have fostered the development of private docks, that the steel companies would have shifted more of their business to the private docks sooner, and that the private docks would have set lower rates for steel companies' dock handling than were charged either by railroads under their tariffs or by any private dock. See *id.* at 99a.

The claims of the private docks and trucking companies also arose out of this hypothetical alternative system of transporting iron ore. These plaintiffs asserted that the use of self-unloading vessels would have increased the amount of ore unloaded at private docks. In turn, the increase in the number and use of private docks would have created additional opportunities for trucking companies to transport ore from those docks to the steel companies.

The district court denied petitioner's JNOV motion. *Id.* at 91a-120a. The court held that *Keogh* did not apply because "each railroad must remain free to propose its own tariffs," and agreements "which purport to curtail such freedom of independent action to propose tariff rates —can give rise to antitrust liability." *Id.* at 96a. The court also held that the jury could find that the railroads' conduct was not "immune" from antitrust scrutiny. *Id.*

"With less than complete confidence," the district court likewise refused to disturb the jury's award of lost "lake freight savings." *Id.* at 101a. In rejecting petitioner's challenge under *Illinois Brick*, the court expressed considerable reservations as to whether the steel companies could recover such damages because their claims were based on savings that vessel operators—not the railroads —would have passed on to them. *Id.* at 99a-100a. To avoid this manifest violation of the indirect-purchaser rule, the district court theorized that the steel companies in a

hypothetical world would have entered the lake-transport market as self-unloading vessel operators and thus would have been directly injured by the railroads' alleged effort to exclude all self-unloaders from that market. *Id.* at 101a.

4. **The Decision of the Court of Appeals.** The court of appeals affirmed. App. 1a-88a. The court held that the rate-related aspects of the case that dominated the steel companies' proof did not violate *Keogh* because the railroads' conduct was designed to exclude potential competitors from the market and was not limited exclusively to rate-related activity. The court of appeals concluded that this case presented an issue "left unresolved" in *Square D, viz.*, whether *Keogh* prevents a private litigant from recovering antitrust damages from railroads that "conspired to preclude competition in which ICC-approved rates played a role in thwarting market entry." *Id.* at 29a.[5]

As for the dock and trucking companies, the court held that *Keogh* does not apply to their antitrust claims because they are competitors (as opposed to customers) of the railroads. In doing so, the court acknowledged expressly that its decision was in conflict with the Sixth Circuit in the *Pinney Dock* case, which held that "*Keogh* . . . bar[s] competitors' claims." App. 36a.

With respect to *Illinois Brick*, the Third Circuit expressly rejected the district court's theory that the steel companies would have become vessel operators and thus would have been injured directly by the railroads' conduct. App. 44a. The court found this theory to be unsupported by the evidence and by the jury's verdict, *id.* at 44 n.15, finding instead that the steel companies' claims for lost savings from vessel companies were those of an "indirect purchaser." *Id.* at 50a. Nevertheless,

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[5] Because the court below rejected petitioner's argument that under *Keogh* only non-rate activity could lawfully serve as a basis for an antitrust claim, the court did not reach the additional defense that evidence of non-rate activity on the part of petitioner was wholly insufficient to support a finding of an antitrust violation. *See* note 9 *infra*.

the court of appeals held that *Illinois Brick* was no bar to recovery because the "indirect purchaser" rule was subsumed by the broader and more amorphous standards announced by this Court in *Associated General Contractors, Inc.* v. *California State Council of Carpenters,* 459 U.S. 519 (1983) (*"AGC"*). The panel bluntly explained that: "It is the *AGC* analysis—the most recent, comprehensive and relevant statement of the Court—which will resolve the standing question here." App. 42a. Thus, even though the steel companies were found to have recovered as indirect purchasers, and even though direct purchasers could and did seek to recover duplicative damages for precisely the same conduct, recovery was allowed because the court of appeals concluded that the *AGC* factors more generally indicated that respondents did have standing to sue under § 4 of the Clayton Act. App. 50a. ("Although B&LE suggests that indirect purchaser status is the death knell of plaintiffs' claims, this conclusion is not supported by current law").[6]

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals has done grievous harm to both the *Keogh* and *Illinois Brick* doctrines and plainly conflicts with decisions of other courts of appeals that have faithfully applied this Court's precedents to those issues. With respect to *Keogh* and *Square D,* the panel's holding that filed rates can be included as the dominant component of an antitrust damage claim where there is proof of some non-rate-related conduct and where the defendant acts to preclude a competitor from entering a particular market unquestionably conflicts with the Sixth Circuit's holding in *Pinney Dock* on identical facts and represents an enormous and unjustified exception to *Keogh*'s clear prohibition against the use of filed rates to recover antitrust damages. Moreover, the acknowledged conflict between the circuits as to whether

[6] The court of appeals denied rehearing. But three judges—Judges Becker, Alito and Stapleton—noted their dissents from the denial of rehearing in banc. App. 130a-131a.

Keogh and this Court's subsequent decision in *Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439 (1945), bar competitors' rate-based claims could not be presented more squarely than by the holding below.

The important and recurring issue concerning *Illinois Brick* as reaffirmed in *Utilicorp* is independently worthy of review. The Third Circuit's decision here to strip the indirect purchaser restriction of all independent significance in light of *AGC* undermines that important doctrine and cannot be reconciled with the rigorous enforcement by this Court in *Utilicorp* and other courts of appeals of the bright-line rule prohibiting indirect purchasers from recovering treble damages.

In sum, the panel's holding raises two issues of recurring significance and the panel's erroneous application of *Keogh-Square D* and *Illinois Brick-Utilicorp* has resulted in the largest affirmed federal antitrust award in history. Accordingly, review by this Court of the judgment below is doubly warranted.

I.

The decision below both creates a conflict and exacerbates an existing division among the courts of appeals over issues critical to the scope and application of the *Keogh* doctrine. *First*, it creates a division among the courts over whether the doctrine applies to conspiracies involving mixed rate and non-rate activities to exclude competitors from a market. *Second*, it deepens the division over whether *Keogh* bars treble damage actions brought by competitors. These issues are significant not only to the nation's railroad industry, which continues to move substantial volumes of traffic under ICC-regulated tariffs, but to a host of industries—including motor carriers, ocean shipping companies, gas pipelines, telecommunications companies and electric and gas utilities—that are subject to federal and state tariff requirements.

A. **Customer Claims.** The court of appeals below acknowledged, as it had to, that "ICC-approved rates

played a role" in the alleged conspiracy to "thwart[] market entry" by lower cost self-unloaders and by private dock and trucking company competitors. App. 29a. Like the district court, the court of appeals found that the defendants effectuated their alleged conspiracy—and thus injured the steel company plaintiffs—through the following three "nefarious means":

> [1] *charging the same rate* for unloading a self-unloader as for unloading a bulker, . . . [2] *refusing to approve commodity line haul rates* from private docks which would have handled self-unloaders [and thus leaving higher class rates to such docks in effect], and . . . [3] concertedly refusing to make dock property available for use by private docks. *Id.* at 51a (emphasis added).

The first two of these "means" indisputably involved the rates filed in tariffs with the ICC.[7]

Citing this Court's decisions in *Keogh, Georgia,* and *Square D,* B&LE argued that tariffed rates, either alone or in tandem with other activity, cannot serve as the basis of antitrust damages. In rejecting this argument, the court of appeals held that *Keogh* does not apply to the steel companies' claims because the purpose of the conspiracy was to "preclude competition" by "thwarting market entry" (App. 29a) and because the means employed were not exclusively rate-related. *Id.* Far from involving an "unresolved" issue, this holding is directly contrary to this Court's opinion in *Square D* and conflicts with the Sixth Circuit's contrary decision, on virtually identical facts, in *Pinney Dock & Transport Co.* v. *Penn Central Corp.*, 838 F.2d 1445 (6th Cir.), *cert. denied,* 488 U.S. 880 (1988), as well as with the Fourth Circuit's decision in *Lifschultz Fast Freight, Inc.* v. *Consolidated Freightways Corp.*, No. 92-2523, 1993 U.S. App. Lexis 16974 (4th Cir. July 6, 1993).

1. *This Court's Decisions.* Construing the term "[i]njured" in what is now § 4 of the Clayton Act, this

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[7] *See also id.* at 93a-94a (district court) (quoted *supra* pp. 3-4).

Court held in *Keogh* that "[i]njury implies violation of a legal right." 260 U.S. at 163. The Court then held that "legal rights" in this setting are defined exclusively by filed tariffs. Accordingly, "[u]nless and until suspended or set aside [by the ICC], this rate [in a published tariff] is made, *for all purposes*, the legal rate." *Id.* at 162-63 (emphasis added). Therefore, the Court held that the treble damage action in *Keogh* was barred because rates were "the instrument by which the damage [was] alleged to have been inflicted." *Id.* at 165.[8] See also *Georgia*, 324 U.S. at 443-44, 453.

In *Square D*, the Court reaffirmed that " '[a] rate is not necessarily illegal because it is the result of a conspiracy in restraint of trade,' ", and that a shipper therefore "could not have been 'injured in his business or property' " by tariffed rates. 476 U.S. at 416 & n.18 (quoting *Keogh*, 260 U.S. at 162). The Court accepted as true the allegation that the defendant carriers conspired "to inhibit or eliminate competition" through coercion. *Id.* at 412. It nevertheless held that, under *Keogh*, "an award of treble damages is not an available remedy for a private shipper" claiming that a filed rate "was the product of an antitrust violation." *Id.* at 422. In so holding the Court reaffirmed *Keogh* as "an established guidepost at the intersection of the antitrust and interstate commerce statutory regimes," and applied it to restrict private damage actions to the non-rate aspects of a conspiracy enforced through coercion. 476 U.S. at 414, 423.

These cases unambiguously establish that tariffed rates cannot give rise to, or form the basis of liability for, antitrust damages. Nevertheless, the Third Circuit refused to apply these precedents because the purpose of the con-

[8] The panel tried to distinguish this case from *Keogh* on the theory that here "the instrument of damage" was not rates but "the absence of the lower-cost combination." App. 32a. The distinction, however, is purely semantic. By the panel's own concession, two of the three "means," and therefore "instruments," that caused the absence of the "lower-cost combination" were rates. *Id.* Thus, *Keogh* cannot be distinguished on this basis.

spiracy was to "preclude competition by thwarting market entry" (App. 29a), the means employed were not exclusively rate-related (*id.* at 32a), and ICC-regulated entities are not immune from the antitrust laws (*id.* at 35a). This Court has already rejected these arguments.

First, contrary to the premise below, *Square D* did not leave "unresolved" the question whether *Keogh* "preclude[s] treble-damage recovery for private litigants claiming that members of a regulated industry conspired to preclude competition in which ICC-approved rates played a role in thwarting market entry." App. 29a. Rather, this Court accepted as true the allegation that the defendant carriers conspired "to inhibit or eliminate competition." *Square D*, 476 U.S. at 412. It nevertheless held that *Keogh* applied insofar as the plaintiffs sought to recover damages based on tariff rates.

Moreover, the issue of whether *Keogh* applies to claims of market exclusion already had been resolved by the Court in *Georgia*. There the State alleged a conspiracy among northern railroads to exclude competition by southern railroads and ports by refusing to enter into joint rate agreements with the southern railroads. The alleged conspiracy had the purpose of thwarting market entry by southern railroads and ports, but this Court held that the "reasoning and precedent of [*Keogh*] apply with full force." *Georgia*, 324 U.S. at 450 & 453.

Second, *Square D* held that, even where non-rate conduct is alleged, if rates played a role, any damages inflicted by such tariff rates cannot, under *Keogh*, constitute injury under § 4. The panel's holding to the contray is flatly wrong. As *Square D* demonstrates, where an alleged conspiracy involves both rate- and non-rate conduct, the proper course is to excise all claims of injury inflicted by tariff rates and confine the trial to the alleged non-rate activity. 476 U.S. at 414 (remanding for opportunity "to state possible claims for damages *not arising*

from the filed tariffs" (emphasis added)). See also *Pinney Dock*, 838 F.2d at 1457 (same).[9] It is uncontroverted that rates not only "played a role" but were at the core of respondents' claims here. See pp. 3-4, 9 *supra* & note 7 *supra*.

Third, the court of appeals' guiding belief that "*Keogh* does not give ICC-regulated industries carte blanche to preclude competition" misses the point. No one suggested that *Keogh* and *Square D* grant immunity from the antitrust laws.[10] As the Court explained in *Square D* (476 U.S. at 422):

> The alleged collective activities of the defendants in both cases were subject to scrutiny under the antitrust laws by the Government and to possible criminal sanctions or equitable relief. *Keogh* simply held that an award of treble damages is not an available remedy. . . .

2. *Circuit Conflicts.* Not only is the holding below flatly contrary to this Court's decisions, it also conflicts with holdings of at least two other circuits. As the panel below acknowledged, "[t]he *Pinney Dock* case involve[d]

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[9] Petitioner has never contended that respondents are prevented from attempting to prove that non-rate-related activities by the railroads injured them. The reason respondents have steadfastly refused to undertake this effort is that there is no evidence that petitioner was part of any conspiracy that was not rate-related. There is no evidence implicating petitioner in any conspiracy to refuse to sell or lease space for private docks. In any event, without a lower rate for transporting the ore to a mill, docks were not economically viable (as acknowledged by respondents in their briefs below). *See* Appellees' Joint Br. at 6 and Erie Br. at 3-4.

[10] Indeed, the original defendants in this action (including B&LE) were defendants in a federal criminal antitrust case. *See United States* v. *Baltimore & Ohio R.R.*, 538 F. Supp. 200 (D.D.C. 1982). The one railroad that went to trial in that action (Norfolk and Western) was acquitted; B&LE's conviction pursuant to its plea of *nolo contendere* was affirmed by the court of appeals. *See United States* v. *Bessemer & Lake Erie R.R.*, 717 F.2d 593 (D.C. Cir. 1983).

the same defendants and the same conspiracy at issue here." App. 33a. Applying *Keogh* to precisely the same "nefarious means" of market preclusion, the Sixth Circuit held "that the *Keogh* doctrine bars the plaintiffs' antitrust damage claims insofar as these claims are based either on the defendants' own handling charges or on the line-haul rate that was applied from [private docks]." 838 F.2d at 1457. In allowing plaintiffs to pursue non-rate-related claims on remand, the Sixth Circuit expressly prohibited reliance on the very evidence and claims that formed the basis for the jury's verdicts here. As the Sixth Circuit explained (*id.* at 1457-58):

> Plaintiffs contend that defendants refused to handle self-unloading vessels at docks owned or operated by defendants and that defendants boycotted Pinney Dock. However, if this boycott or refusal to deal took the form of assessing higher rates and charges, it would again appear that these claims are within the scope of *Keogh*. Plaintiffs also allege that defendants divided markets, but if the effect of such division is the lack of rate competition, *Keogh* would again bar recovery.

The conflict between the decisions of the Third and Sixth Circuits could not be starker. Passing on the same conspiracy, undertaken by the same defendants for the same allegedly exclusionary purposes, the Third Circuit found that *Keogh* posed no bar to affirmance of a $660 million treble damages award that was based on precisely the same rate-related conduct that the Sixth Circuit held lawful under *Keogh*.[11] These wholly disparate results —and the inconsistent interpretations of *Keogh* that produced them—warrant review by this Court.

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[11] The suggestion by the panel that the "different procedural position" of the *Pinney Dock* case somehow distinguishes the two rulings (*see* App. 33a) is entirely mistaken. Reviewing a summary judgment decision, the Sixth Circuit was obliged, like the panel below, to view the evidence most favorably to the antitrust plaintiffs. The panel's purported distinction, therefore, is entirely without significance.

The court's rationale in this case is also inconsistent with the Fourth Circuit's summary affirmance in *Lifschultz Fast Freight*. In that case, the plaintiff alleged that a group of trucking concerns conspired "to provide false information to the rate bureaus and the ICC which would allow the defendants to charge below cost . . . . [as] part of a scheme of predatory pricing . . . designed to force the defendants' competitors out of the . . . market." *Lifschultz*, 805 F. Supp. 1277, 1282 (D.S.C. 1992). In a decision the Fourth Circuit found to be "thorough and well reasoned," the district court held that "Lifschultz's Sherman Act, RICO, and [state antitrust] claims were barred by the *Keogh* doctrine" even though non-rate activity was alleged and even though market exclusion was the anticompetitive aim of the conspiracy. *Lifschultz Fast Freight*, 1993 U.S. App. Lexis 16974, at *2 (footnote omitted).

Thus, the Third Circuit's flawed reasoning not only departs from this Court's rulings, but also has created a division among the circuits on a critical question of antitrust and regulatory law. As this case and the Sixth Circuit's decision in *Pinney Dock* graphically illustrate, a tariff-regulated entity's potential liability for hundreds of millions of dollars in antitrust damages currently depends on the circuit in which an antitrust plaintiff chooses to bring suit. This Court should grant certiorari to ensure a uniform and proper construction of the *Keogh* doctrine among the circuit courts.

B. **Competitor Claims.** The decision below also is inconsistent with this Court's decision in *Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439 (1945). There, this Court applied *Keogh* to claims the State brought in its *parens patriae* capacity on behalf of its shippers and ports and in its capacity as a shipper and the owner of a railroad. The court below deemed *Georgia* inapplicable because this Court treated Georgia's claim as a proprietor as a "make weight." App. 37a n.6. But this Court in *Georgia* ruled that *Keogh* also applied to the State's *parens patriae* claim on behalf of its ports, which, like the dock

plaintiffs here, claimed that filed rates caused them injury by impeding their ability to compete for traffic. See also *Pinney Dock*, 838 F.2d at 1457 n.12 (applying *Keogh* to virtually identical claims by private docks because this Court had "appl[ied] *Keogh* in a case where Georgia was both a customer and a competitor").

Despite the clear holding of *Georgia*, the lower courts remain badly divided over whether *Keogh* applies to competitor claims. Relying on an earlier Third Circuit decision, as well as decisions by the Second, Eighth and Ninth Circuits, the panel below held that *Keogh* does not apply to treble damage claims brought by competitors. App. 36a (citing *Barnes* v. *Arden Mayfair, Inc.*, 759 F.2d 676 (9th Cir. 1985); *Kirkwood* v. *Union Elec. Co.*, 671 F.2d 1173 (8th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983); and *Groton* v. *Connecticut Light & Power Co.*, 662 F.2d 921 (2d Cir. 1981)). As the court here acknowledged, its holding conflicts directly with that of the Sixth Circuit in *Pinney Dock*, which ruled that *Keogh* barred such claims.

Noting the remedial aspects of the ICA and the fact that competitor-plaintiffs have "a right under the IC[A] to complain to the Commission" (838 F.2d at 1457), the Sixth Circuit held in *Pinney Dock* that there was no sound basis for limiting *Keogh* to treble damage claims brought by consumers. As the Sixth Circuit explained (*id.*):

> [T]he ICC possesses and ought to have the power to override . . . [the policies underlying the antitrust laws] in order to further national transportation policy . . . Rates must not only protect against over charging captive customers but must also keep in mind the economic costs of delivery of the service. Regulation of one aspect inevitably begets regulation of the other. Thus, the ICC is the sole source of the rights not only of shippers, but of the entire public, including competitors.

It follows that an exception to *Keogh* for competitor claims is not only unnecessary, in view of the broad remedial jurisdiction of the ICC, but would subvert rate

regulation under the ICA. Moreover, it is completely anomalous to hold the rate legal for some purposes and some plaintiffs, but illegal for others. These same considerations led the Fourth Circuit to apply *Keogh* to competitor claims. Thus, in *Lifschultz*, 805 F. Supp. at 1277, the district court expressly adopted the Sixth Circuit's reasoning (*id.* at 1295), a disposition the Fourth Circuit affirmed on appeal. The acknowledged conflict in the circuits, coupled with the release of two inconsistent court of appeals rulings within weeks of each other, demonstrate plainly that the applicability of *Keogh* to antitrust damage claims warrants review by this Court.

C. **Widespread Importance of Keogh.** The applicability of the *Keogh* doctrine to alleged conspiracies designed to exclude a market participant and to claims brought by competitors has significance far beyond the affirmance of a record $660 million judgment. These issues are profoundly important to the entire railroad industry, as well as to a host of other industries subject to federal and state tariff requirements.

Notwithstanding the partial deregulation of the railroad industry under the Staggers Act of 1980, substantial volumes of rail traffic continue to be shipped under ICC tariffs. In addition, motor carriers also remain subject to ICC-tariff regulation. Although the Motor Carrier Act of 1980 partially deregulated the trucking industry, motor common carriers "must fil[e] tariffs [with the ICC] specifying the rates adopted by the carrier." *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116, 126 (1990).

Nor is the scope of the *Keogh* doctrine relevant only to industries subject to ICC regulation. A number of federal statutes require other regulated entities to publish their rates in tariffs subject to agency oversight, see, *e.g.*, 15 U.S.C. § 717c(c) (interstate sellers and transporters of natural gas); 16 U.S.C. § 824d(c) (interstate sellers and transmitters of electricity); 47 U.S.C. § 203 (providers of interstate telephone service); 46 U.S.C. § 844 (inter-

coastal ocean shipping companies).[12] Indeed, there is a separate but related doctrinal conflict among the circuits concerning the application of *Keogh* to competitors' claims arising out of rates for electricity.[13] As a result of the division of authority created and exacerbated by the decision below, the scope of antitrust liability of some of the nation's largest utilities and industrial concerns will turn on the fortuity of the federal circuit in which they are sued.

II.

The decision of the Third Circuit conflicts with the bright-line rule, first announced in *Illinois Brick* and consistently followed by this Court (most recently in *Utilicorp*) and by all other courts of appeals, that antitrust plaintiffs who are "indirect purchasers" do not suffer "injury" within the meaning of § 4 of the Clayton Act. In disregarding the bar to recovery by "indirect purchasers," the court below also compounded the widespread confusion among the courts of appeals over the relationship between antitrust injury and antitrust standing. That confusion has now ripened into a clear circuit conflict with the Third Circuit's unprecedented decision here, which holds that regardless of whether a plaintiff can independ-

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[12] Moreover, because the critical language of the treble damage provision that this Court construed in *Keogh* is identical to the private right of action set forth in the Racketeer Influenced Corrupt Organizations Act (RICO) (*compare* 18 U.S.C. § 1964(c) *with* 15 U.S.C. § 15(a)), the decision below could significantly broaden the liability of tariff-regulated entities under RICO as well. *See H.J., Inc.* v. *Northwestern Bell Tel. Co.*, 954 F.2d 485, 494 (8th Cir.), *cert. denied*, 112 S. Ct. 2306 (1992) (holding that *Keogh* doctrine, and decisions construing its applicability and scope, are fully applicable to RICO actions); *Taffet* v. *Southern Co.*, 967 F.2d 1483, 1494 (11th Cir.), *cert. denied*, 113 S. Ct. 657 (1992) (same).

[13] *See Concord* v. *Boston Edison Co.*, 915 F.2d 17 (1st Cir. 1990), *cert. denied*, 499 U.S. 931 (1991); *Kirkwood* v. *Union Elec. Co.*, 671 F.2d 1173 (8th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983); *Groton* v. *Connecticut Light & Power Co.*, 662 F.2d 921 (2d Cir. 1981).

ently establish "injury" under § 4 of the Clayton Act, it still may seek treble damages so long as it asserts antitrust "standing" under the balancing approach set forth in *AGC*.

A. Indirect Purchaser Claims. If the Third Circuit had properly applied the "indirect purchaser" rule, it would have reversed the vast majority of the damages awarded against petitioner here. Those damages clearly are barred by the bright-line rule, first announced in *Illinois Brick* and consistently followed by this Court and all other courts of appeals, that "indirect purchasers"—those relying for damages upon a theory that directly injured third parties would have passed on savings to plaintiffs—do not suffer "injury" within the meaning of § 4. *Illinois Brick*, 431 U.S. at 736-47.

1. In *Illinois Brick*, the State of Illinois claimed that concrete block suppliers overcharged contractors by fixing prices, and that the contractors in turn passed on the overcharge to the State. The Court had previously prohibited defendants from defending against antitrust claims on grounds that any injury suffered by an overcharged plaintiff had been "pass[ed]-on" to plaintiff's customers. *Hanover Shoe, Inc.* v. *United Shoe Mach. Corp.*, 392 U.S. 481, 493 (1968). In *Illinois Brick*, the Court held that the ban on "pass-on" theories also applied to plaintiffs. The Court offered two reasons for its holding. *Illinois Brick*, 431 U.S. at 730. First, allowing offensive, but not defensive, use of pass-on theories would "create a serious risk of multiple liability for defendants." *Id.* Second, calculating damages under a plaintiff's pass-on theory typically would involve even greater "evidentiary complexities and uncertainties" than the Court identified in *Hanover Shoe* as grounds for rejecting defendants' use of pass-on. *Id.* at 731-32. In addition, the Court made clear that its decision was not limited to the facts of that case: the Court rejected "attempts to carve out exceptions to the *Hanover Shoe* rule for particular types of markets." *Id.* at 744.

The question resolved in *Illinois Brick*—whether an indirect purchaser may be deemed to have "been injured in its business as required by § 4" (*id.* at 724)—is a threshold question to be resolved in every antitrust damage case. Thus, the Court noted that its decision did not reach the distinct issue of standing: "Because we find *Hanover Shoe* dispositive here, we do not address the standing issue, except to note . . . that the question of which persons have been injured by an illegal overcharge for purposes of § 4 is analytically distinct from the question of which persons have sustained injuries too remote to give them standing to sue for damages under § 4." *Id.* at 728 n.7. See also *Blue Shield v. McCready*, 457 U.S. 465, 473 & 476 (1982) (same).

The vitality and far-reaching applicability of *Illinois Brick* as a distinct limitation on the availability of the § 4 remedy was powerfully reinforced by the Court's decision in *Utilicorp*. This Court reaffirmed "[t]he *Illinois Brick* rule," 497 U.S. at 212, and strengthened the prohibition against exceptions to it, *id.* at 216-17. In *Utilicorp*, the Court applied that rule to a case where the middlemen were public utilities. The nature of public utility ratemaking made it plausible to assume that the utilities would pass on 100% of any overcharges to their customers. Nevertheless, the Court emphatically reaffirmed the *Illinois Brick* rule, "hold[ing] that only the utility has the cause of action because it alone has suffered injury within the meaning of § 4." *Id.* at 204, 212. The Court recognized that "[t]he possibility of allowing an exception, even in rather meritorious circumstances, would undermine the rule." *Id.* at 216; see also *id.* at 217. Nowhere in *Utilicorp* did the Court suggest that the "analytically distinct" *Illinois Brick* rule had been subsumed in the standing inquiry expounded in *AGC* seven years before *Utilicorp* was decided. Indeed, petitioners in *Utilicorp* unsuccessfully presented that very same argument to the court of appeals, and this Court's *Utilicorp* opinion did not even refer to *AGC*.

This Court affirmed the decision of the Tenth Circuit which expressly rejected the argument, based on

AGC, "that *Illinois Brick* should not be read as a rigid bar to recovery on the part of all indirect purchasers." *In re Wyoming Tight Sands Antitrust Cases*, 866 F.2d 1286, 1294 (10th Cir. 1989), *aff'd sub nom., Kansas* v. *Utilicorp United, Inc.*, 497 U.S. 199 (1990). See also *Adams* v. *Pan Am. World Airways, Inc.*, 828 F.2d 24, 28 n.9 (D.C. Cir. 1987) (distinguishing *AGC* from *Illinois Brick*, "which flatly precludes indirect purchasers from bringing antitrust actions in virtually all cases"). In light of *Utilicorp*, the court of appeals' conclusion that "current law" does not support the argument that respondents' status as "indirect purchasers" is the "death knell" of their claims (App. 50a) is both provocative and worthy of review by this Court.

The court of appeals "discount[ed]" the Court's decision in *Utilicorp* as "current law" because that decision applied "the pass-on theory of standing in the public utility arena." App. 50a n.21. To the contrary, *Utilicorp* applies fully to cases, such as this one, where the amount of the pass-through is speculative. Far from being limited in any way, *Utilicorp* expressly reaffirms the Court's determination in *Illinois Brick* "not to 'carve out exceptions to the [direct purchaser] rule for particular types of markets.' " *Utilicorp*, 497 U.S. at 216 (quoting *Illinois Brick*, 431 U.S. at 744) (brackets in original). "[E]ven assuming that any economic assumptions underlying the *Illinois Brick* rule might be disproved in a specific case," the Court wrote, "we think it an unwarranted and counterproductive exercise to litigate a series of exceptions." *Utilicorp*, 497 U.S. at 217.

2. The bright-line rule of *Illinois Brick* and *Utilicorp* plainly bars most—$524 million—of the steel companies' award in this case. The steel companies recovered damages for lost savings that directly-injured third parties—vessel and dock companies—allegedly would have passed on to them had the use of self-unloaders and private docks in the iron ore trade not been delayed. With respect to these damages, therefore, the steel companies are "indirect purchasers," and their injuries in that capacity are

not compensable under § 4. App. 50a & n.21; *Illinois Brick*, 431 U.S. at 736-47.

Both of the reasons that led the Court to prohibit pass-on damage theories apply with full force here. First, duplicative recoveries are inevitable. The steel companies' recovery for lost savings overlaps the damages that the vessel and dock companies can and have claimed for being denied the opportunity to provide self-unloader and dock services. The same hypothetical pool of reduced costs is the source of increased vessel company profits or, if passed on to the steel companies, savings in steel company transportation costs.[14] In fact, the very same lake freight savings (and much of the dock savings) recovered by the respondent steel companies were also claimed by a vessel operator and a dock operator in a separate lawsuit

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[14] The court of appeals speculated in a footnote that "the steel companies' damages would not *necessarily* duplicate the damages of the vessel and docking companies," App. 89a-90a (emphasis added). Offering the hypothetical that the steel companies might have paid $7/ton for the lake carriage and dock handling of iron ore using self-unloaders and private docks, instead of $10/ton using bulkers and railroad docks, it stated that steel companies could then collect $3/ton in lost savings while the vessel and docking companies could collect their lost profits out of the $7. *Id.* at n.22.

The hypothetical demonstrates just how badly that court misread *Illinois Brick*. Not only does the panel's analysis erroneously assume that the possibility of duplicative recovery is permissible, *see* 431 U.S. at 731, but it is conceptually flawed because it ignores that the vessel companies, dock companies and steel companies have conflicting interests in maximizing their respective share of the pool of lost savings. The steel companies' incentive is to argue that dock and vessel companies would reduce their prices as low as possible—to $7 total (in the hypothetical)—in order to increase the amount of their lost savings, while the dock and vessel companies have every incentive to argue they would not cut their prices nearly so much—say only to $9 combined—in order to maximize the damages they can recover as lost profits. *See Pinney Dock*, 838 F.2d at 1464 (noting duplicative claims even between dock and vessel companies). Because these conflicting claims create an intolerable risk of duplicative recoveries and are inherently speculative, the analysis below proves why the indirect purchaser rule bars recovery here.

settled by petitioner.[15] Thus, the court's reasoning below "cannot protect against multiple liability where the direct purchasers have already recovered . . . by settling." *Illinois Brick*, 431 U.S. at 731 n11.[16]

Second, respondents' damage theory is extraordinarily complex and speculative. The court of appeals specifically recognized that "complex apportionment problems are implicated here." App. 53a. The steel companies' pass-on theory required the jury to speculate as to the savings that independent firms in two industries (vessel transportation and dock services) would have passed on to independent firms in a third industry (steel) if a fourth industry (rail transportation) had not delayed the use of self-unloaders for shipping iron ore. It involved precisely the kind of speculation about "complex economic adjustments to a change in the cost of a particular factor of production" that the Court rejected in *Illinois Brick*. 431 U.S. at 732. It also presented the "nearly insuperable difficulty" of trying to prove "what the direct purchaser might have done," which the Court condemned in *Utilicorp*, 497 U.S. at 209 (quoting *Hanover Shoe*, 392 U.S. at 493).

B. Injury Versus Standing. The court of appeals acknowledged that the steel companies' claims were those

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[15] One vessel company, Litton, and one dock company, Pinney Dock, previously sued B&LE and the other railroad defendants for treble damages. The damages Litton was permitted to seek included the profits it lost in not being able to introduce self-unloaders sooner. *Pinney Dock*, 838 F.2d at 1452. Similarly, Pinney Dock was permitted to assert claims that it would have attracted business because its charges for dock services would have been less than those at the railroad docks. *Id.* at 1451-53, 1482-83.

[16] Under *Hanover Shoe*, petitioner is precluded from arguing that any damages suffered by the parties directly injured by the delay in the introduction of self-unloaders, namely the vessel and dock companies, should be reduced by the amount of "savings" that those companies would have passed on to their customers, the steel companies. In turn, under *Illinois Brick* and *Utilicorp*, the steel companies must be precluded from recovering those same "pass-on" savings. 431 U.S. at 730-31.

of an "indirect purchaser"; that the vessel companies were entities that had suffered "direct antitrust injury" (App. 52a); that the vessel companies' claims for lost profits would "overlap" the steel companies' claims of lost savings (*id.* at 53a); and that "[t]he concern for duplicative recovery and the potential for complex apportionment of damages are real," (*id.* at 52a). But the court nonetheless affirmed the award of treble damages, refusing to treat "the 'indirect purchaser' rule of *Illinois Brick* as announcing a strict prohibition against recovery by indirect purchasers." *Id.* at 50a n.21. Instead, the court of appeals concluded that whether a plaintiff can establish antitrust injury under *Illinois Brick* is merely one factor that can be outweighed in the context of "a more complex and differently focused [standing] inquiry" under *AGC*. App. 44a.

The court of appeals misread *AGC* and other related decisions of the Court, and in so doing created a clear conflict among the circuits. *AGC* did not involve a claim for damages by an indirect purchaser. *AGC* is a case about antitrust *standing*, which, as the Court carefully noted in *Illinois Brick* and *McCready*, is an issue "analytically distinct" from whether an indirect purchaser should be considered to have suffered an *injury* under § 4. *Illinois Brick*, 431 U.S. at 728 n.7; *McCready*, 457 U.S. at 473, 476. In setting forth factors to guide the standing inquiry, the Court in *AGC* provided no license for rehabilitating the antitrust damage claims of indirect purchasers. To the contrary, the Court in *AGC extended* the logic of *Illinois Brick* to bar claimants who did not bring indirect purchaser claims, but whose relationship to the alleged violation was nonetheless remote.

The Third Circuit's decision thus permits recovery of treble damages by plaintiffs who have not suffered injury within the meaning of § 4. Contrary to the reasoning of the panel, this Court's decision in *AGC* did not alter or eliminate the mandatory requirement that a plaintiff suffer antitrust injury before being permitted to pursue

an antitrust claim. The panel's transformation of the dispositive "injury" element into merely one among a number of factors to balance in determining standing conflicts with this Court's recognition in *Cargill, Inc.* v. *Monfort*, 479 U.S. 104, 110 n.5 (1986), that a " 'showing of antitrust injury *is necessary*, but not always sufficient, to establish standing under § 4 . . . ." (emphasis added). Because "antitrust injury" is indispensable to a § 4 claim, it follows *a fortiori* that an indirect purchaser's lack of any "injury" at all within the meaning of *Illinois Brick* is fatal to a § 4 claim, even if that plaintiff might otherwise establish standing under the *AGC* factors.

Not only does the holding below implicate a significant issue under *Illinois Brick*, but also it exacerbates a related doctrinal problem concerning the relationship between antitrust injury and antitrust standing. The courts of appeals themselves have found that there is a "great deal of confusion" among the circuits on that issue. *Greater Rockford Energy & Technology* v. *Shell Oil Co.*, 998 F.2d 391, 394-95 (7th Cir. 1993). With the Third Circuit's decision here, that confusion has ripened into a clear conflict among the circuits. A number of circuits, including the Seventh and the Tenth, hold that antitrust injury and antitrust standing are entirely separate and independently necessary elements of an antitrust claim.[17]

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[17] *See, e.g., Greater Rockford Energy & Technology* v. *Shell Oil Co.*, 998 F.2d 391, 394-95 (7th Cir. 1993) (affirming grant of summary judgment for defendants on ground that plaintiffs failed to show antitrust injury; court declined to address issue of antitrust standing and discussed distinction between antitrust injury and antitrust standing at length) ("Lack of standing and antitrust injury often have been invoked interchangeably against a plaintiff even though each concept involves a distinct element of the § 4 action"); *Sharp* v. *United Airlines, Inc.*, 967 F.2d 404, 406 (10th Cir.) ("[w]hile the two concepts [antitrust injury and antitrust standing] are closely linked, they are nonetheless distinct"), *cert. denied*, 113 S. Ct. 464 (1992); *Chanute* v. *Williams Natural Gas Co.*, 955 F.2d 641, 652 n.14 (10th Cir.) ("[a]n antitrust injury is different from antitrust standing"), *cert. denied*, 113 S. Ct. 96 (1992); *Reazin* v. *Blue Cross & Blue Shield*, 899 F.2d 951, 960

Other circuits, including the Fifth, Sixth, Eighth, and Eleventh, hold that under this Court's decision in *AGC*, antitrust injury is intertwined with the requirement of antitrust standing.[18] Nevertheless, those courts have made clear that, even if antitrust injury is part of the standing inquiry, it remains an essential part: without antitrust injury, those courts have held, there is no antitrust standing.[19] The primacy of the injury requirement is thus recognized in those circuits as well, and therefore, those courts would have disallowed all of the lake freight and dock savings awarded in this case.

The Third Circuit stands alone in upholding an award of treble damages to plaintiffs on the ground that they have standing under *AGC*, without regard to whether they have suffered antitrust injury under § 4. No other court has ever applied *AGC* to circumvent the ap-

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(10th Cir. 1990) ("antitrust injury" is an "essential element[] in a private antitrust damages action"), *cert. denied*, 497 U.S. 1005 (1990).

[18] *See, e.g., Bell* v. *Dow Chemical Co.*, 847 F.2d 1179, 1182 (5th Cir. 1988) ("[a]ntitrust injury is a component of the standing inquiry, not a separate qualification"); *Todorov* v. *DCH Healthcare Auth.*, 921 F.2d 1438, 1449 & 1451 n.20 (11th Cir. 1991) (describing two-pronged approach to antitrust standing, with first prong being "whether the plaintiff has suffered 'antitrust injury'"); *Axis, S.p.A.* v. *Micafil, Inc.*, 870 F.2d 1105, 1108-09 (6th Cir.) ("[a]ntitrust injury is a concept distinct from antitrust standing, but is an element in the determination of standing"), *cert. denied*, 493 U.S. 823 (1989); *Lovett* v. *General Motors Corp.*, 975 F.2d 518, 520 (8th Cir. 1992) (describing antitrust injury as part of standing inquiry).

[19] *See, e.g., Lovett*, 975 F.2d at 521 ("[b]ecause [plaintiff] has not shown he suffered an antitrust injury, he lacks federal antitrust standing"); *Todorov*, 921 F.2d at 1451 n.20 ("*Cargill* has clarified that antitrust injury is a necessary component of antitrust standing. Thus, the discussion of factors beyond antitrust injury in [*AGC*] is best viewed as dicta"); *Axis*, 870 F.2d at 1109 (affirming dismissal on basis of failure to show antitrust injury and expressly declining to consider other *AGC* factors); *Bell*, 847 F.2d at 1182 ("antitrust injury is a necessary requirement for proving standing").

plication of the requirement of antitrust injury under *Illinois Brick* in such a manner. To the contrary, in cases involving comparable pass-on damages claims, courts have repeatedly recognized that the plaintiff's status as an indirect purchaser requires dismissal regardless of whether the plaintiff could assert standing under *AGC*.

For example, *Laurel Sand & Gravel, Inc.* v. *CSX Transp., Inc.*, 924 F.2d 539, 543-44 (4th Cir.), *cert. denied*, 112 S. Ct. 64 (1991), was a market exclusion case in which the Fourth Circuit held that a railroad customer was barred by *Illinois Brick* from recovering for an "indirect" injury resulting from the railroad's refusal to lease trackage rights to its lower-cost competitor with whom the customer sought to deal. The court stated that the customer's "harm from the refusal of trackage rights [was] discernible but indirect" because, like the steel companies here, it "only lost potential savings on transportation costs through [the] direct purchaser [*i.e.*, the competitor]." *Id.* at 544. The *Laurel Sand* court barred recovery on *Illinois Brick* grounds without addressing *AGC* at all. See also *In re Coordinated Pretrial Proceedings*, 691 F.2d 1335, 1340-41 (9th Cir. 1982) (holding that *Illinois Brick* precluded customers of non-conspiring competitors of defendants from claiming they were overcharged as a result of defendants' antitrust violation).

Here, too, the plaintiffs have sought to recover damages for savings that parties other than defendants might have passed on to them absent defendants' antitrust violation. But the Third Circuit has ignored the rule of *Illinois Brick* and has allowed plaintiffs to recover damages based on savings lost in transactions with non-parties. Had the Third Circuit applied the *Illinois Brick* rule as other courts of appeals have done, the steel companies' damages award would have been reversed.

C. AGC. The court of appeals' analysis of the *AGC* factors illustrates the importance of enforcing *Illinois Brick* as an independent limitation on recovery under § 4. *Each* of the three factors on which the court of appeals

relied to affirm the steel companies' standing was expressly rejected in *Illinois Brick* as a basis for allowing indirect purchasers to recover damages. First, the court of appeals stressed that "B&LE's antitrust activity directly impacted the steel companies," noting that the steel companies "were the sole customers" of the vessel companies and that as ultimate consumers they "bore the brunt of the increased costs." App. 51a. That same argument was made by the dissenters in *Illinois Brick*, and was rejected by the majority. "For in many instances, the brunt of antitrust injuries is borne by indirect purchasers, often ultimate consumers of a product, as increased costs are passed along the chain of distribution." *Illinois Brick*, 431 U.S. at 749 (dissenting opinion).

Second, the court was impressed that "[t]here are no missing links in the causation chain here." App. 51a. The same is true in any indirect purchaser case. The fact that the Court in *Illinois Brick* and in *Utilicorp* was able to identify plaintiffs' precise place in the "chain of distribution" (431 U.S. at 726; 497 U.S. at 207-08) did not alter its conclusion that only the directly injured party had suffered "injury" under § 4.

Finally, the court argued that the goals of the antitrust laws were furthered by allowing customers denied the "benefits of price competition" to seek damages. App. 52a. Any indirect purchaser could make that claim. The Court acknowledged this concern in both *Illinois Brick* and *Utilicorp*, but held that the antitrust laws would be most effectively enforced if the indirect purchaser was not allowed to sue. *Illinois Brick*, 431 U.S. at 745-47; *Utilicorp*, 497 U.S. at 214-16. The only other factors discussed by the panel each weigh in favor of dismissing the steel companies' claims.[20]

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[20] The court below acknowledged the presence of "other victims" who "suffered direct antitrust injury," the overlap between the steel companies' lost savings on lake transportation costs and the vessel companies' lost profits, and the complexity of the steel companies' damages claims. App. 52a-54a.

In short, the court of appeals' decision permits courts to take the same factors that were rejected by this Court in *Illinois Brick* and *Utilicorp* and employ them, through the guise of a standing analysis under *AGC*, to allow indirect purchasers to recover. That decision cannot be reconciled with decisions of this Court and other courts of appeals. It is especially noteworthy that the panel would reach such a result in a half-billion dollar case that *admittedly* presents the twin concerns of duplicative damages and unduly complex economic theories that were central to the Court's holding in *Illinois Brick*. The Third Circuit's departure from settled law and the need to resolve the widespread confusion among the courts of appeals, particularly in a case of this magnitude, warrants plenary review by the Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 25, 1993

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